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June 6, 2013

VIA FAX: 212-805-7901

Honorable Harold Baer

United States District Judge

U.S. District Court, Southern District of NY

500 Pearl Street

New York, NY 10007-1312

Re: Kerry Ashdown v. Equinox Holdings, Inc., et al.
Civil Action No.: 13-1374

Dear Judge Baer:

We represent the defendants in this action and are writing in accordance with Section 5G of Your Honor's Individual Practices to notify the Court that the defendants intend to proceed with their initially filed motion.

By way of background, on May 17, 2013, defendants served a Rule 12(b) motion seeking to dismiss: (i) the sixth, ninth, tenth, and eleventh causes of action in plaintiff's Amended Complaint and (ii) *all* claims against the individual defendants Joseph Matarazzo and Matthew Herbert. In response to defendants' motion to dismiss and pursuant to Section 5G of Your Honor's Individual Practices, plaintiff prepared and submitted to us a "Second Amended Complaint."¹ This document reflects that plaintiff has conceded the merits of defendants' motion, as each and every cause of action that the defendants sought to dismiss via the instant

¹ Actually, this is the fourth Complaint filed by plaintiff. For reasons best known to plaintiff's counsel, plaintiff originally commenced two separate actions: (1) the instant action before Your Honor and (2) a second action which was assigned to Judge Hellerstein (Civil Action No. 13-cv-1321). Plaintiff chose to proceed with the action before Your Honor and discontinued the action before Judge Hellerstein. She then filed an Amended Complaint in the instant action on April 8, 2013 (i.e. the complaint against which defendants originally moved to dismiss), followed by her Second Amended Complaint in this action, which was filed on June 4, 2013 in response to Equinox's motion to dismiss.

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motion was deleted from the amended pleading. However, despite the fact that there are no longer any causes of action asserted against Mr. Matarazzo and Mr. Herbert in their individual capacities in the complaint, these two individuals are still identified as party defendants in the

caption of the case, as well as in the body of the complaint. In fact, the Second Amended Complaint even inexplicably includes Mr. Herbert's telephone number. Furthermore, although plaintiff has removed all of the causes of action which defendants sought to dismiss, she has not deleted any of the allegations that served as the underlying predicates for the corresponding causes of action (e.g. paragraphs 2, 8, 13, 23, 24, 26, 28, 37, 68, 97, 102, 103, and 104 of the Second Amended Complaint). We can think of no good reason as to why plaintiff would continue to assert these factual allegations in her Second Amended Complaint while at the same time abandoning the claims themselves, except that plaintiff intends to pursue discovery into these areas.

Defendants respectfully suggest that the instant motion can be disposed of simply through the issuance of an Order: (1) granting defendants' motion to dismiss the sixth, ninth, tenth, and eleventh causes of action in plaintiff's Amended Complaint with prejudice, (2) dismissing all claims against the individual defendants Joseph Matarazzo and Matthew Herbert with prejudice, and (3) ordering that the caption be amended to remove Mr. Matarazzo and Mr. Herbert as defendants. With respect to the superfluous factual allegations in the Second Amended Complaint, defendants recognize that there is no motion before the Court to strike these allegations, but we would be remiss if we did not now assert our objection to this and also reserve defendants' right to object to any discovery by the plaintiff into these allegations.

A proposed Order is respectfully enclosed for Your Honor's consideration. In accordance with the Local Rules, the proposed Order has also been sent by email to the Clerk of the Court.

Respectfully submitted,

Patrick McPartland

cc: Walker G. Harman, Esq. (via email)

SUBMITTED:

Harold Baer, Jr., U.S.D.J.

Date:

6/28/13

I think the cleaner way to proceed is for you to submit the order on notice to all of them is my suggestion. If they do not I will sign it.